

2004 WL 6339865 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Hawai'i.
Honolulu County

STate of Hawaii, by its Office of Consumer Protection, Plaintiff,

v.

Rodwin L. WONG; Alan A. Kimura; Dan Fox (aka Daniel B. Aregger and Daniel Dare); Alden James Arquette; Arthur P. Kalahiki; Cathleen Nakamura Possedi (aka Cathleen Nakamura and Cathleen Possedi); Sidney Mondschein; Dan Fox & Associates, Inc., a Hawaii corporation; Hawaii Estate Services, Inc., a Hawaii corporation; Standard Life Insurance Company of Indiana, an Indiana corporation; The Williams Financial Group, Inc., a Texas corporation; John Does 1-30; Doe Corporations 1-10; Doe Entities 1-30, Defendants.

No. 041131707.
October 13, 2004.

**Plaintiff's Motion for Preliminary Injunction Against Defendant Alden James Arquette;
Memorandum in Support of Motion; Affidavit of Counsel; Exhibits "1 - 9"; Affidavit of Warren J.
Hayama; Exhibits "10 - 39"; Affidavit of George H. Collins; Exhibit "1"; Affidavit of Jan Takata;
Affidavit of Angela Lin; Affidavit of Mary Cowing; Notice of Hearing and Certificate of Service**

Michael J. S. Moriyama #7003, Office of Consumer Protection, State of Hawaii, 235 South Beretania Street, Suite 801, Honolulu, Hawaii 96813-2419, Telephone: (808) 586-2636, Attorney for Plaintiff.

Judge: Victoria S. Marks.

Hearing Date:

Date: OCT 22 2004

Time: 8:30am

Plaintiff respectfully moves this Court for preliminary injunction against Defendant Alden James Arquette ("Defendant Arquette") for the relief requested in the Complaint.

Specifically Plaintiff requests the court issue preliminary injunction against Defendant Arquette in the form attached hereto as Exhibit "1".

This motion is brought pursuant to [Rule 65 of the Hawaii Rules of Civil Procedure](#) and is based on the records and files of the case, the materials attached hereto, and such further matters as may be presented in court.

Plaintiff's Ex Parte Motion for Temporary Restraining Order Against Defendant Alden James Arquette is being filed concurrently with this motion.

DATED: Honolulu, Hawaii, 10/12/04.

<<signature>>

MICHAEL J. S. MORIYAMA

Attorney for Plaintiff

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I. INTRODUCTION

Plaintiff, pursuant to Haw. Rev. Stat. §§ 480-15 and 487-15¹, seeks to enjoin Defendant Alden James Arquette (“Defendant Arquette”) from making any decisions, transacting any business or activity or otherwise acting on behalf of Hazel Cherry, a 92 year-old recent widow suffering from dementia, paranoia and macular degeneration which has left her legally blind, her trusts or estate and the trusts or estate of her deceased husband, Limuel Cherry, independently or under any grant of power of attorney or appointment as trustee or executor. Plaintiff also asks that the Office of Public Guardian be appointed as guardian of the Hazel Cherry's person and Maximum Legal Services Corp. be appointed as guardian of Hazel Cherry's property and as trustee and executor for any trusts or estate of Hazel or Limuel Cherry.

At this time, Plaintiff is not seeking any other relief against Defendant Arquette.

II. PROCEDURAL BACKGROUND

On July 19, 2004, Plaintiff filed its Complaint in this action against Defendant Arquette and several other Defendants. The Complaint alleged that Defendant Arquette and other Defendants targeted Hawaii's elderly consumers and sold them long-term deferred annuities through unfair or deceptive acts or practices in violation of Haw. Rev. Stat. §§ 480-2 and 481A-3 and other statutory provisions.

On August 9, 2004, the Complaint and Summons in this action were served on Defendant Arquette by personal delivery at the Zippy's parking lot on Maunakea Street, Honolulu, Hawaii, as evidenced by the Return and Acknowledgment of Service filed herein on August 12, 2004.

Defendant Arquette's answer to the Complaint was initially due on or before August 30, 2004.

On August 31, 2004, Defendant Arquette asked for a 30-day extension to answer the Complaint. Exh. “2” attached to the Aff. of Counsel.

Plaintiff agreed to grant an extension allowing Defendant Arquette to answer the Complaint on or before September 20, 2004. Exh. “3” attached to the Aff. of Counsel.

On September 13, 2004, Defendant Arquette informed Plaintiff that Earl Anzai would represent him but was going to be in Japan until October 2004. On September 14, 2004, Plaintiff informed Defendant Arquette that Earl Anzai was not an active member of the State Bar Association and therefore not authorized to practice law in Hawaii. Exh. “4” attached to the Aff. of Counsel.

On September 20, 2004, Defendant Arquette informed Plaintiff that Mr. Anzai would be representing Defendant Arquette and would do whatever it takes to become admitted to the Hawaii State Bar Association once Mr. Anzai returned to Hawaii. Plaintiff informed Defendant Arquette that Mr. Anzai was not currently authorized to practice law in Hawaii and, as a result, Plaintiff would communicate directly with Defendant Arquette until a properly authorized attorney was hired. Exh. “5” attached to the Aff. of Counsel.

By September 23, 2004, Defendant Arquette had not filed or served an answer to the Complaint. Plaintiff granted Defendant Arquette additional time to September 30, 2004 to answer the Complaint. Exh. “6” attached to the Aff. of Counsel.

By October 1, 2004, Defendant Arquette had not filed or served an answer to the Complaint.

On October 1, 2004, the default of Defendant Arquette was entered by the Court Clerk. Ent. of Default of Def. Arquette (filed Oct. 1, 2004).

III. THE ENTRY OF DEFAULT OF DEFENDANT ARQUETTE CONSTITUTES AN ADMISSION OF LIABILITY BY SAID DEFENDANT AS TO THE ALLEGATIONS IN THE COMPLAINT.

Upon the entry of default, Defendant Arquette lost standing to contest the fact of his liability. *Occidental Underwriters of Hawaii, Ltd. v. American Security Bank*, 5 Haw. App. 437, 433 (1985) (citing *Clifton v. Tomb*, 21 F.2d 893 (4th Cir. 1927) (emphasis added); *World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)); *Kam Fui Trust v. Brandhorst*, 77 Haw. 320, 884 P.2d 383 (1994).

Plaintiff filed this suit alleging that Defendant Arquette violated [Haw. Rev. Stat. §§ 480-2, 481A-3](#) and other statutory provisions in targeting **elderly** consumers in Hawaii and selling them long-term deferred annuities by and through the commission of unfair or deceptive acts or practices. In its Complaint, Plaintiff asked, in part, that Defendant Arquette be enjoined, pursuant to [Haw. Rev. Stat. §§ 480-15](#) and [487-15](#), from engaging in further unfair and deceptive acts or practices. Defendant Arquette has been served, has not filed an answer and, therefore, has been declared in default. As a result of Defendant Arquette's default, Plaintiff necessarily has prevailed on the merits regarding Defendant Arquette's commission of the unlawful conduct described in the Complaint.

However, while Defendant Arquette cannot argue the fact of his liability, pursuant to [Haw. R. Civ. P. 65](#){b}, where a temporary restraining order is granted without notice, a motion for preliminary injunction shall be set for hearing at the earliest possible time to determine whether the sought-after injunction is an appropriate remedy.

IV. FACTUAL BACKGROUND

As early as November 1997, Hazel Cherry suffered from blurred vision. Exh. "10" attached to the Aff. of Warren J. Hayama ("Hayama Aff.").

As early as August 1998, Hazel was recognized as being legally blind. Exh. "11" attached to the Hayama Aff.

As early as October 2002, Hazel Cherry was diagnosed as suffering from [dementia](#). Hazel Cherry also suffered from numerous other medical conditions. Exh. "12 - 13" attached to the Hayama Aff.

On April 22, 2003, however, Defendant Arquette sold to Hazel Cherry, who was 91 years old at the time, a deferred annuity issued by Great American Life Ins. Co. ("Great American Life") for an initial premium of \$800,000.00. The \$800,000.00 was paid from Hazel's Merrill Lynch account. Exh. "14 - 16" attached to the Hayama Aff.; Aff. of Jan Takata ("Takata Aff."). Defendant Arquette pretended to be Merrill Lynch telling Hazel that they could no longer handle her account. Aff. of Angela Lin. ("Lin Aff.") ¶ 10.

On or around April 25, 2003, Defendant Arquette sold to Limuel Cherry a deferred annuity issued by Great American Life for an initial premium of \$14,300.00. Exh. "17" attached to the Hayama Aff.

On May 3, 2004, Hazel Cherry decided to cancel the \$800,000.00 annuity purchased through Defendant Arquette. Takata Aff ¶¶ 6 - 14.

Also, on May 3, 2004, Defendant Arquette was specifically advised of Hazel's mental condition and possible inability to enter into contracts. Takata Aff. ¶ 10. Defendant Arquette acknowledged notice of Hazel's mental condition. Takata Aff. ¶ 10; Aff. of George H. Collins ("Collins Aff.") ¶ 13.

On May 5, 2004, Hazel Cherry executed the documents necessary to cancel the \$800,000.00 annuities purchased through Defendant Arquette. Takata Aff. ¶¶ 11-13.

On May 6, 2003, Defendant Arquette caused securities held by Hazel Cherry in her Merrill Lynch account to be transferred to Defendant The Williams Financial Group, Inc. (“Defendant WFG”). Exh. “18 - 20” attached to the Hayama Aff. Defendant WFG subsequently churned transactions in Hazel Cherry’s account. Exh. “21 - 28” attached to the Hayama Aff.

On October 31, 2003, Hazel Cherry purportedly granted a durable power of attorney to Defendant Arquette.² Defendant Rodwin L. Wong (“Defendant Wong”) prepared the form. Defendant Alan A. Kimura (“Defendant Kimura”) purportedly notarized the document.³ Exh. “30” attached to the Hayama Aff.

On October 31, 2003, Limuel Cherry purportedly granted a durable power of attorney to Defendant Arquette. Again, Defendant Wong prepared the form. Defendant Kimura purportedly notarized the document. Exh. “32” attached to the Hayama Aff.

On November 5, 2003, Defendant Wong prepared the Hazel K. Cherry Revocable Living Trust Agreement. The document was incorrectly signed by Defendant Arquette as “Initial Trustee”⁴ and purportedly notarized by Defendant Kimura. Exh. “33” attached to the Hayama Aff.

On November 5, 2003, Hazel Cherry purportedly executed a Short Form Trust Agreement Hazel K. Cherry Revocable Living Trust naming Defendant Arquette as initial trustee and Defendant Arquette’s sister, Vana Arquette-Leong, as successor trustee. Defendant Wong prepared the document. Defendant Kimura purportedly notarized the document. Exh. “34” attached to the Hayama Aff.

On November 5, 2004, for some reason another Short Form Trust Agreement Hazel K. Cherry Revocable Living Trust naming Defendant Arquette as initial trustee and Vana Arquette-Leong as successor trustee is purportedly executed by Hazel Cherry,⁵ Defendant Wong prepared the document. Defendant Kimura purportedly notarized the document. Exh. “35” attached to the Hayama Aff.

On or around January 16, 2004, after Hazel, now 92 years old, cancelled the \$800,000.00 annuity and Defendant Arquette acknowledged that Hazel suffered from dementia and paranoia, Defendant Arquette sold Hazel Cherry a 17-year deferred annuity for an initial premium of \$128,993.21. Exh. “36” attached to the Hayama Aff.

On or around April 29, 2004, Defendant Arquette sold Hazel Cherry yet another long-term deferred annuity for an initial premium of \$320,000.00. Exh. “37” attached to the Hayama Aff.

On June 25, 2004, Defendant Wong amends the Hazel K. Cherry Revocable Living Trust to name Defendant Arquette as initial trustee instead of Hazel Cherry. Defendant Kimura purportedly notarized the document. Exh. “38” attached to the Hayama Aff.

On August 2, 2004, Hazel Cherry’s husband, Limuel Cherry, passed away. Exh. “39” attached to the Hayama Aff. Mr. Cherry provided care and assistance to Hazel while he was alive. Lin Aff, Hazel now resides in a care home. Hayama Aff.

After Limuel’s death, Hazel expresses concern about Defendant Arquette (Collins Aff.; Lin Aff.; Aff. of Mary Cowing (“Cowing Aff.”)), but also being helpless and dependent on him because he has control of everything (Collins Aff.).

In or around October 2004, Defendant Arquette arranged for attorney Richard C. F. Chun (“Attorney Chun”) to represent Hazel Cherry. On October 1, 2004, Defendant Arquette informed Plaintiff that Attorney Chun advised Defendant Arquette not to turn

over any of Hazel's records to anyone including Plaintiff.⁶ Exh. "7 - 8" attached to the Aff. of Counsel. Defendant Arquette did not inform Attorney Chun of this lawsuit or of Plaintiff's outstanding discovery request. Aff. of Counsel.

V. UNFAIR OR DECEPTIVE TRADE PRACTICES

480-2 prohibits unfair and/or deceptive trade practices. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Haw. Rev. Stat. § 480-2(a) (1993). "In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." Haw. Rev. Stat. § 480-2(b) (1993). However, "No showing that the proceeding or suit would be in the public interest (as those terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section." Haw. Rev. Stat. § 480-2(c) (1993). In addition, "our courts must interpret and apply the statute in light of conditions in Hawaii." *Island Tobacco Co., Ltd. v. R.J. Reynolds Tobacco Co.*, 63 Haw. 289, 300, 627 P.2d 260, 268 (1981) (footnotes omitted).

In violating 480-2 a trade practice does not need to be unfair *and* deceptive. *State v. U. S. Steel Corp.*, 82 Haw. 32, 51, 919 P.2d 294, 313 (1996). In addition, "[r]emedial statutes are liberally construed to suppress the [perceived] evil and advance the [enacted] remedy." *Flores v. United Air Lines, Inc.*, 70 Haw. 1, 12, 757 P.2d 641, 647 (1988) (quoting N. Singer, 3 Sutherland, Statutes and Statutory Construction § 60.01 (4th ed. 1986) (footnote omitted in original)). "[T]he language proscribing unfair and deceptive practices in § 480-2 is far-reaching." *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199, 1226 (D. Haw. 1980). "'HRS § 480-2 ... was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive trade practices for the protection of ... consumers'" *U. S. Steel*, 82 Haw. at 51, 919 P.2d at 313 (quoting *Ai v. Frank Huff Agency, Ltd.*, 61 Haw. 607, 616, 607, P.2d 1304, 1311 (1980) (footnote omitted in original)).

In determining what is "unfair," the Supreme Court of the United States recognized three factors:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n. 5 (1972) (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964)), Federal courts in Hawaii have adopted the Supreme Court's standards. *Robert's*, 491 F. Supp. 1199; *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assn.*, 809 F.2d 626 (9th Cir. 1987). The Hawaii Intermediate Court of Appeals also adopted the U.S. Supreme Court's standard for unfairness. *Eastern Star, Inc. v. Union Building Materials Corp.*, 6 Haw. App. 125, 712 P.2d 1148 (1985). In addition, the federal district court in Hawaii noted that,

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."

Robert's, 491 F. Supp. at 1226 (quoting S.C. Rep. No. 267, 3d leg., Reg. Sess., House Journal at 600 (1965) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., at 19 (1914))). Unfairness goes beyond deception. "The Supreme Court, has 'put its

stamp of approval on the Commission's evolving use of a consumer unfairness doctrine not moored in the traditional rationales of anticompetitiveness or *deception*.' " *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1363 (1988) (quoting *American Financial Services v. F.T.C.*, 247 U.S. App. D.C. 167, 767 F.2d 957, 965-72 (D.C. Cir. 1985)) (emphasis in original).

A practice is “deceptive” if it causes, “as a natural and probable result, a person to do that which he would not otherwise do.” *Eastern Star*, 6 Haw. at 133, 712 P.2d at 1154 (citing *Bockenstette v. F.T.C.*, 134 F.2d 369 (10th Cir. 1943)). “However, the cases indicate that actual deception need not be shown; the capacity to deceive is sufficient.” *Eastern Star*, 6 Haw. at 133, 712 P.2d at 1154 (citing *Goodman v. F.T.C.*, 244 F.2d 584 (9th Cir. 1957)); *Davis v. Wholesale Motors, Inc.*, 86 Haw. 405, 949 P.2d 1026 (Haw. Ct. App. 1997); *Rosa v. Johnston*, 3 Haw. App. 420, 427, 651 P.2d 1228, 1234 (1982) (quoting *Trans World Accounts, Inc. v. F.T.C.*, 594 F.2d 212, 214 (9th Cir. 1979)). The Hawaii Supreme Court has recognized the “deceptive” standards enumerated in *Eastern Star* and *Rosa*. *U. S. Steel*, 82 Haw. 32, 91 9 P2d 294.

More specifically, courts have deemed misrepresentations to be unfair and deceptive. As the Court in *Rosa* noted,

The Commission and federal courts have found the following false representations to be unfair or deceptive acts or practices under § 5(a)(1): (1) that a business had continued for more than 50 years when it had not, *Marcher v. F.T.C.*, 126 F.2d 420 (2d Cir. 1942); (2) that a corporation was established in 1904, when it was actually incorporated in 1932, *Re Art National Manufacturers Distributing Co.*, 58 F.T.C. 719 (1961), *aff'd* 298 F.2d 476 (2d Cir. 1962); (3) that salesmen of a furnace company were heating engineers, when they were not, *Holland Furnace Company v. F.T.C.*, 295 F.2d 302 (7th Cir. 1961); and (4) that plaintiff's bureau of research would furnish accurate information on every subject matter through its staff of competent editors, all experts in their particular field, when there was only ‘one old man’ available, *Consolidated Book Publishers, Inc. v. F.T.C.*, 53 F.2d 942 (7th Cir. 1931), *cert. denied* 286 U.S. 553 (1931).

Rosa, 3 Haw. App. At 426-27, 651 P.2d at 1234. Understandably, omissions are also unfair or deceptive. *Simeon Management Corp. v. F.T.C.*, 579 F.2d 1137 (9th Cir. 1978) (advertisements are deceptive even if they contain no false facts but failed to disclose that the weight loss program involved the use of an injection that was found unsafe and not effective against obesity); *J.B. Williams Co. v. F.T.C.*, 381 F.2d 884 (6th Cir. 1967) (Geritol advertisements must disclose that iron deficiency anemia is not the cause of most tiredness); *Benrus Watch Co. v. F.T.C.*, 352 F.2d 313 (8th Cir. 1965), cert denied 384 U.S. 939 (1966) (failure to disclose \$1.00 service charge to repair guaranteed watch); *Waltham Watch Co. v. F.T.C.*, 318 F.2d 477 (D.C. Cir. 1963), cert. denied 375 U.S. 944 (1964).

In addition to 480-2, 481A-3 prohibits specifically enumerated “per se” deceptive trade practices.⁷ Engaging in conduct specifically identified in 481A-3 necessarily constitutes a violation of 480-2. “A person engages in a *deceptive trade practice* when” Haw. Rev. Stat. § 481A-3(a) (1993) (emphasis added). “[D]eceptive acts or practices in the conduct of any trade or commerce are unlawful.” Haw. Rev. Stat. § 480-2(a) (1993) (emphasis added).

Defendant Arquette, who can no longer contest the fact of his liability due to his default, can be found liable under more than one statutory provision as all remedies are cumulative and not mutually exclusive. “The penalties provided in this section are cumulative to the remedies or penalties available under all other laws of this State.” Haw. Rev. Stat. § 480-3.1 (1993). “The relief provided in this section is in addition to remedies otherwise available against the same conduct under common law or other statutes of this State.” Haw. Rev. Stat. § 481 A-4(c) (1993).

VI. PRELIMINARY INJUNCTION

In *Life of the Land v. Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978), the Supreme Court set forth the following three-pronged test to determine when a temporary injunction should be granted: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support granting the issuance of a temporary injunction? The Court noted that balancing the various elements of the test is to be done on a sliding scale. “We recognize that the weight to be attached to the various elements of the test may vary, and that a strong showing of irreparable harm may reduce the weight given to any lack of likelihood of success on the merits.” *Id.* at 165 - 166, 1122 (citations omitted). The Hawaii Intermediate Court of Appeals in *Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw. App. 272, 630 P.2d 646 (1981) elaborated on balancing the 3 elements. “The more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits (citations omitted). Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction.” *Id.* at 276, 650.

In applying the Hawaii Supreme Court’s test to determine whether a temporary injunction should be issued, it is clear that all three elements of the test are met and that a temporary injunction should be granted against Defendant Arquette.

A. Plaintiff will prevail on the merits as Defendant Arquette as Defendant Arquette's default has been entered and he can no longer contest the fact of his liability,

Upon the entry of default, Defendant Arquette lost standing to contest the fact of his liability. *Occidental Underwriters of Hawaii, Ltd. v. American Security Bank*, 5 Haw. App. 437, 433 (1985) (citing *Clifton v. Tomb*, 21 F.2d 893 (4th Cir. 1927) (emphasis added); *World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971). rev’d on other grounds, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)); *Kam Fui Trust v. Brandhorst*, 77 Haw. 320, 884 P.2d 383 (1994). On October 1, 2004, the Court Clerk entered the default of Defendant Arquette. Based on the entry of his default. Defendant Arquette can no longer argue that he did not commit the violations alleged in the Complaint filed against him and Plaintiff will necessarily prevail on the merits.

B. The balance of irreparable damage to consumers favors the issuance of the preliminary injunction.

“Injury is irreparable where it is of such a character that a fair and reasonable redress may not be had in a court of law.” *Penn*, 2 Haw. App. at 276, 646 (citations omitted). There is no doubt that irreparable harm has already come to Hazel Cherry.

First and foremost, Hazel Cherry is 92 years old and suffers from a host of medical problems, including **dementia**, **paranoia** and **macular degeneration** which has [eft her legally blind. Exh. “10-13” attached to the Hayama Aff.

Second, Defendant Arquette has repeatedly ignored his own acknowledgment that Hazel suffers from dementia and may not have had the capacity to make informed decisions regarding the purchase of multiple, large, single-premium, long-term, deferred annuity contracts or matters concerning her estate and trust. Takata Aff., Collins Aff., Lin Aff.

Third, Defendant Arquette has repeatedly ignored the fact that Hazel Cherry cancelled the first long-term deferred annuity contract he sold her. Takata Aff.

Fourth, Hazel has expressed concern and fear of Defendant Arquette but has also expressed helplessness and hopelessness in her situation because Defendant Arquette controls all her assets. Collins Aff., Cowing Aff., Lin Aff. Nothing can remedy that but the removal of Defendant Arquette from Hazel’s life.

Fifth, Defendant Arquette continues to self-deal, employing deception and unfair tactics and selling inappropriate and unsuitable single-premium long-term deferred annuities to Hazel Cherry (Exh. “14 - 17, 36 - 37” attached to the Hayama Aff.) earning him generous commissions, and attempt to secure his position in having total control of Hazel’s life and assets (Exh. “29 - 30, 32 - 35” attached to the Hayama Aff.). Defendant Arquette deceived Hazel Cherry when he called as a Merrill Lynch representative

advising Hazel that Merrill Lynch could no longer handle her account. Lin Aff. ¶ 10. Defendant Arquette currently has a purported grant of power of attorney by Hazel and Limuel Cherry and appointment as trustee and/or executor of Hazel and/or Limuel Cherry's trusts or estate. Exh. "29 - 30, 32 - 35" attached to the Hayama Aff. However, Hazel Cherry has expressed concern and even fear of Defendant Arquette. Collins Aff., Lin Aff., Cowing Aff. In addition, it is unclear whether the grant of power of attorney and appointment as trustee and/or executor was properly notarized by Defendant Alan A. Kimura and, therefore, it is unclear whether the power of attorney was properly granted and any appointment of Defendant Arquette as trustee and/or executor was properly executed. Exh. "31" attached to the Hayama Aff. Furthermore, as recently as October 1, 2004, Defendant Arquette has attempted to hide his unlawful conduct by using the advice of attorney Richard C. F. Chun, given on incomplete information, to not provide any records to Plaintiff. Exh. "1 - 2" attached to Aff. of Counsel. In June 2004, Defendant Wong amended Hazel Cherry's trust to reinforce his purported appointment as trustee. Exh. "38" attached to the Hayama Aff. In April and January 2004, Defendant Arquette sold Hazel Cherry at least 2 single-premium long-term deferred annuities for total initial premiums totaling \$448,993.21. Exh. "36 - 37" attached to the Hayama Aff. This was *after* Defendant Arquette sold the first single-premium long-term deferred annuity to Hazel Cherry for an initial premium of \$800,000.00 in April 2003 (Exh. "14 - 16" attached to the Hayama Aff.) which was cancelled by Hazel Cherry (Takata Aff.) and *after* Defendant Arquette was notified and acknowledged that Hazel Cherry suffered from dementia and may not have the capacity to enter into such annuity contracts (Takata Aff., Collins Aff.).

Sixth, Defendant Arquette had failed to protect the Hazel's assets from **abuse** by others. In May 2003, Defendant Arquette had securities held by Hazel Cherry in her Merrill Lynch account transferred to Defendant The Williams Financial Group who subsequently churned her account. Exh. "18 - 28" attached to the Hayama Aff.

Seventh, it is unlikely Defendant Arquette has the wherewithal to be able to make Hazel immediately liquid at a time in her life when she most needs to be. It is unlikely that Defendant Arquette can restore Hazel Cherry to the financial position that she was in prior to the sale of the \$800,000.00 annuity in April 2003. As such, further acts and transactions committed or executed by Defendant Arquette involving Hazel Cherry's assets should be immediately prevented.

Eighth, there will be no pecuniary loss to Defendant Arquette caused by the temporary restraining order. Defendant Arquette himself stated that he is serving Hazel "out of the goodness of his heart". Collins Aff.

C. Public interest supports the granting of a preliminary injunction in that without the injunction. Defendant Arquette can and will continue to self-deal, converting Hazel Cherry's liquid assets to long-term obligations.

A temporary injunction is needed to prevent further harm to Hazel Cherry. Society should not allow its extremely vulnerable **elderly** citizens to be victimized. Hazel Cherry is 92 years old, suffering from **dementia**, paranoia and **macular degeneration** and recently widowed. When her husband passed away, Hazel lost her primary caregiver. At a time in her life when she should be most liquid, Defendant Arquette has tied up significant portions of her liquid assets in several long-term deferred annuities that earn him generous commissions. Defendant Arquette has managed to assume complete control of Hazel's life and has not only failed to protect her from financial exploitation but has inflicted such financial **abuse** upon her himself. The legislature has recognized that Hawaii's **elderly** warrant extra protection by providing enhanced remedies for violations committed against the **elderly**. Haw. Rev. Stat. §§ 480-13.5 (2003 Supp.), 487-14(f) (2003 Supp.).

VII. CONCLUSION

All three elements necessary for the issuance of a temporary injunction are satisfied. Plaintiff necessarily will prevail on the merits because Defendant Arquette has defaulted and cannot contest the fact of his liability. The possibility of irreparable harm to Hazel Cherry is likely because she is 92 years old and suffers from a host of medical problems; Defendant Arquette continues to self-deal, selling inappropriate and unsuitable single-premium long-term deferred annuities to Hazel Cherry, earning him generous commissions and attempting to secure his position in having total control of Hazel's life and assets; Defendant Arquette

has repeatedly ignored his acknowledgment that Hazel suffers from dementia and does not want to purchase deferred annuities; Hazel has expressed concern and fear of Defendant Arquette but has also expressed helplessness and hopelessness in her situation because Defendant Arquette controls all her assets and nothing can remedy that but the removal of Defendant Arquette from Hazel's life; it is unlikely Defendant Arquette has the wherewithal to be able to make Hazel immediately liquid at a time in her life when she most needs to be and it is unlikely that Defendant Arquette can restore Hazel Cherry to the financial position that she was in prior to the sale of the \$800,000.00 annuity in April 2003. Therefore, public interest supports an immediate injunction against further unlawful acts. Plaintiff respectfully moves the Court to restrain and enjoin Defendant Arquette as set forth in the form attached hereto as Exh. "1".

DATED: Honolulu, Hawaii, 10/12/04.

<<signature>>

MICHAEL J. S. MORIYAMA

Attorney for Plaintiff

Footnotes

- ¹ "The attorney general may bring proceedings to enjoin any violation of this chapter; provided that the director of the office of consumer protection may also bring proceedings to enjoin any violation of [section 480-2](#)," Haw. Rev. Stat, § 480-15 (1993). "The director of commerce and consumer affairs or the office of consumer protection may bring civil proceedings to enjoin any violation of section 457-13(a) or any other unlawful act or practice affecting consumers, trade, or commerce." Haw. Rev. Stat. 5 [487-15](#) (1993).
- ² Hazel Cherry told George Collins that Defendant Arquette told her he can sign her name and then showed her he could do it. Aff. of George H. Collins ¶ 28.
- ³ Defendant Kimura falsified notarizing other documents. Exh. "31" attached to the Hayama Aff.
- ⁴ The trust agreement identified Hazel Cherry as Trustee. Exh. "32".
- ⁵ The signatures are not identical on the 2 Short Form Trust Agreement Hazel K. Cherry Revocable Living Trust documents.
- ⁶ Plaintiff's First Request for Production of Documents to Defendant Alden James Arquette was served on Defendant Arquette on September 8, 2004. Exh. "9" attached to the Aff. of Counsel.
- ⁷ [Haw. Rev. Stat. § 481A-3\(a\)](#) (1993) states, "A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person: (5) Represents that goods or services have ... , approval, characteristics ... that they do not have ... ; (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; ... or (12) Engages in any other conduct which similarly creates a likelihood of confusions or of misunderstanding."